

LETTER OPINION
95-L-177

July 31, 1995

Mr. John Hoeven
President
Bank of North Dakota
P.O. Box 5509
Bismarck, ND 58502-5509

Dear Mr. Hoeven:

Thank you for your July 7, 1995, memorandum concerning the Bank of North Dakota's ability to serve as a processing depository for credit card transactions. Specifically, you ask whether the Bank of North Dakota ("BND") is "[o]rganized under the laws of the United States or any state or territory thereof, as a financial institution eligible for federal deposit . . . insurance" to qualify for membership in the VISA program as provided for under Article II (Membership), Section 2.01(a), of VISA U.S.A. By-Laws.

The key issue is whether BND is "a financial institution eligible for federal deposit . . . insurance." The Federal Deposit Insurance Corporation ("FDIC") is the sole federal agency responsible for insuring the deposits of both banks and savings associations under the federal deposit insurance laws. 12 U.S.C. §§ 1814-1817, 1821(a)(1). 12 U.S.C. § 1815(a)(1) provides that "any depository institution which is engaged in the business of receiving deposits . . ., upon application to and examination by the Corporation and approval by the Board of Directors, may become an insured depository institution." Application factors include the financial history condition of the depository institution, the adequacy of the depository institution's capital structure, the future earnings prospects of the depository institution, and the general character and fitness of the management of the depository institution. 12 U.S.C. § 1816. A "depository institution" is defined under 12 U.S.C. § 1813(c) as "any bank or savings association," and a "bank" is defined as including "any national bank" or "State bank." 12 U.S.C. § 1813(a)(1)(A). A State bank is defined as including "any bank . . . which . . . is engaged in the business of receiving deposits . . . and . . . is incorporated under the laws of any State" 12 U.S.C. § 1813(a)(2).

Thus, to meet the test of being a State bank, it is only necessary that BND be both engaged in the business of receiving deposits and incorporated under state law.

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Since its inception, BND has been engaged in the business of receiving deposits. See N.D.C.C. § 6-09-09. The creation of BND was explained by the North Dakota Supreme Court in Sargent County v. State, 182 N.W. 270, 271 (N.D. 1921), as follows:

Pursuant thereto, the Legislative Assembly, in February, 1919, established the Bank of North Dakota (chapter 147, Laws 1919). The act declares the purpose of the state of North Dakota to engage in the banking business and establish a system of banking under the name of the Bank of North Dakota, owned, controlled, and operated by the state under the name of the "Bank of North Dakota." The act further provides that the Industrial Commission (consisting of the Governor, the Attorney General, and the Commissioner of Agriculture and Labor) shall operate, manage, and control the bank; that the bank shall be opened and shall proceed to business whenever there shall be delivered to the Industrial Commission bonds in the sum of \$2,000,000 issued by the state; that the fund procured by the sale of such bonds shall be designated and known as the capital of such bank (section 6). All state, county, township, municipal, and school district funds, and funds of all penal, educational, and industrial institutions, and all public funds, were required to be deposited in such bank within three months after the passage and approval of the act, subject to certain exceptions (section 7). The bank was authorized to receive deposits from any source including the United States government and any foreign or domestic individual corporation, municipality, or bank, and to deposit funds to the credit of the bank in any bank or agency approved by the Industrial Commission (section 9).

Id. See N.D.C.C. ch. 6-09.

Based on information from BND's most recent "Consolidated Report of Condition" dated March 31, 1995, BND's total deposits were \$605,084,000.00 of which \$509,665,000.00 were in interest-bearing accounts. The consolidated report lists BND's total assets at \$969,683,000.00. It is therefore my opinion that BND "is engaged in the business of receiving deposits" and therefore meets the first part of the two-part test to be eligible for federal deposit insurance.

The second part of the test is whether BND has been incorporated under the laws of North Dakota. One source defines "incorporate" as "[t]o create a corporation, to confer

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a corporate franchise upon determinate persons." Black's Law Dictionary, 690 (5th ed. 1979). "Under" is defined by one source, in part, as "subject to the bidding or authority of." Webster's Third New International Dictionary, 2487 (1966).

The North Dakota Supreme Court explained that "[a] corporation is not in fact or in reality a person, but is created by statute and the law treats it as though it were a person by the process of fiction, or by regarding it as an artificial person distinct and separate from its individual stockholders." Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983). In Sargent County, 182 N.W. at 275, the North Dakota Supreme Court held that BND was subject to a garnishment proceeding in the same fashion as a private corporation. In so holding, the North Dakota Supreme Court relied upon United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824), Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837), Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12 (1851), and Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853), in which it was noted that the state banks of Georgia, Kentucky, Alabama, and Arkansas were incorporated by legislative act. Sargent County, 182 N.W. at 272-73. Quoting Chief Justice Marshall in Planters' Bank of Georgia, the North Dakota Supreme Court observed:

[M]any states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

182 N.W. at 272-73. Likewise, the North Dakota Legislature treated BND as a separate corporation subject to suit so far as the transactions of the bank are concerned. N.D.C.C. § 6-09-27.

Viewing BND as an incorporated entity is consistent with the history of banking in the United States. For example, the First Bank of the United States was created by congressional act. See Milton R. Schroeder, The Law and Regulation of Financial Institutions, 1-6 (1995). Indeed, the constitutionality of First Bank was upheld by the United

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States Supreme Court in the historic case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), noting "that the chartering of the First Bank was a measure 'necessary and proper' to the exercise of Congress's fiscal powers under the Constitution to raise revenue, borrow money, and regulate commerce." Schroeder, supra, at 1-8. Similarly, BND's purpose is to promote agriculture, commerce, and industry within the state of North Dakota. N.D.C.C. § 6-09-01.

Based on the above analysis, it is my opinion that BND is a State bank organized under the laws of North Dakota as a financial institution eligible for federal deposit insurance and is therefore eligible to participate in the VISA program.

Additionally, I have reviewed the requirements of VISA membership conditions and determined that there are no legal impediments to BND's direct participation as a VISA member.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dec/pg